

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PHILLIP J. LYONS,

Plaintiff,

vs.

CONNIE BISBEE, et al.

Defendants.

3:07-CV-460-LRH (RAM)

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

Before the court is Defendants' Partial Motion for Judgment on the Pleadings (Doc. #30). Plaintiff has filed an opposition (Doc. #35) and Defendants have replied (Doc. #44). After a thorough review of the arguments and relevant legal authority, and with good cause appearing, the court recommends that the motion be granted in part and denied in part.

**I. BACKGROUND**

At the time of the events underlying his allegations, Plaintiff was in custody of the Nevada Department of Corrections (NDOC) as an inmate at Nevada State Prison (NSP) and Lovelock Correctional Center (LCC). (Doc. #21.) Defendants Bisbee, Goodson, Vieth, and Salling are members of Nevada Board of Parole Commissioners. The remaining defendants are NDOC employees. Defendants Whorton, Angelone, Crawford, Bayer and Skolnik are former and current NDOC Directors, and Defendant Cox is named as the Assistant Director of

1 Operations. Defendants Baca, Donat, and Palmer are wardens and associate wardens at the  
2 institutions where Plaintiff has been housed. Finally, Defendants Keith and Grafton are  
3 caseworkers at NSP, Defendant Hyde is a correctional officer holding the rank of sergeant,  
4 Defendant Smith is a CRP Specialist, and Defendant Schlottman is a Classification Specialist.

5 Plaintiff brings various claims related to the deprivation of his civil rights by prison  
6 officials under 42 U.S.C. § 1983. Count I of the complaint alleges that Defendants Bayer,  
7 Angelone, Crawford, Whorton, and Skolnik are responsible for a policy or custom that  
8 permitted Plaintiff to be classified as a sex offender though he was never convicted of this  
9 charge. (*Id.* at 27.) Plaintiff alleges that the jury was not able to agree on a verdict at his  
10 criminal trial and that it was subsequently dismissed at sentencing. (*Id.* at 4.) He further  
11 alleges that he learned of this classification on September 25, 2006 during a caseworker  
12 interview. Defendants Grafton, Donat, Baca, and Schlottman are also named for denying  
13 Plaintiff's grievances relating to this issue. (*Id.* at 26.<sup>1</sup>) Plaintiff alleges that this conduct  
14 violated his due process and equal protection rights.

15 In Count II, Plaintiff alleges that Defendant Angelone, the former director of the  
16 Department of Corrections, violated his Eighth Amendment rights by allowing Plaintiff to be  
17 transferred to LCC in 1998 due to the sex offender classification. (*Id.* at 29.)

18 In Count III, Plaintiff alleges that sometime in March 2007, Defendant Keith prepared  
19 and presented the Nevada State Parole Board with a report falsely accusing Plaintiff of a sexual  
20 offense, resulting in due process and equal protection violations that led to Plaintiff's parole  
21 denial. (*Id.* at 31-32.) Plaintiff alleges that the allegations in this report were a dominant factor  
22 in the Parole Board's decision to deny Plaintiff parole for three years. Plaintiff further alleges  
23 that this submission to the Board violated his Fourteenth Amendment rights to due process  
24 and equal protection. Plaintiff also names Defendants Keith, Baca, Donat, Cox, Schlottman, and  
25 Smith for denying Plaintiff's grievances related to this issue.

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27 <sup>1</sup> Page references to the Plaintiff's complaint utilize his handwritten numbering; all other references to  
28 the pleadings utilize the numbering generated by the electronic case filing system.

1 In Count IV, Plaintiff alleges that members of the Parole Board, including Defendants  
2 Bisbee, Goodson, and Vieth, violated Nevada's open meeting law by discussing the dismissed  
3 charge at the April 2007 hearing without having it placed on agenda or providing advance  
4 notice to Plaintiff. Plaintiff alleges that he was treated as a sex offender and repeatedly  
5 questioned about this dismissed charge, resulting in a denial of his Fourteenth Amendment  
6 rights to due process and equal protection. (*Id.* at 33-34.)

7 In Count V, Plaintiff alleges that the parole board's decision to deny him parole was  
8 based on an outdated set of guidelines. Plaintiff also alleges that the decision is a result of  
9 retaliatory animus for his dismissed sexual offense charge. (*Id.* at 35-36.) Plaintiff alleges  
10 violations of the Eighth Amendment, the Fifth Amendment right against double jeopardy, the  
11 Fourteenth Amendment right to due process and equal protection under the law, and his rights  
12 under the Ex Post Facto Clause of the U.S. Constitution. (*Id.*)

13 In Count VI, Plaintiff alleges that the Parole Board unfairly discriminated against him  
14 because of his geographic location and race. (*Id.* at 37.) Plaintiff alleges that the Parole Board  
15 tends to deny parole in longer intervals for inmates incarcerated in prisons located in the  
16 northern part of the state and those of African American descent. (*Id.*) Based on the  
17 allegations, Plaintiff alleges a violation of the Equal Protection Clause of the Fourteenth  
18 Amendment.

19 In Count VII, Plaintiff alleges that Defendant Salling, the chairwoman of the Parole  
20 Board, permitted a policy, practice, or custom of treating Plaintiff as a sex offender, which  
21 resulted in an adverse parole decision. (*Id.* at 39.) Plaintiff also alleges that Defendant Salling  
22 should be liable for allowing the Board to apply the outmoded guidelines in reaching its  
23 decision and for allowing it to discriminate against Plaintiff based on his geographic location  
24 within the state. (*Id.* at 40.)

25 In Count VIII, Plaintiff alleges that Defendant Whorton and other NDOC officials have  
26 maintained a retaliatory campaign against Plaintiff because he successfully settled a prior  
27 lawsuit against NDOC. (*Id.* at 42.) Plaintiff alleges that former warden James Schomig  
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1 imposed various punitive measures in retaliation for a letter Plaintiff had written. Plaintiff  
2 alleges that since then, prison officials have failed to reverse any of these measures to retaliate  
3 against Plaintiff for the lawsuit. (*Id.* at 43.) Plaintiff alleges a violation his First Amendment  
4 right of access to the courts to seek redress for his grievances.

5 In Count IX, Plaintiff alleges that he was subjected to a strip search on May 22, 2006 in  
6 an open area of the prison while observed by female prison officials. He alleges an Eighth  
7 Amendment violation based on this incident. (*Id.* at 44-45.)

8 In Count X, Plaintiff alleges that his First Amendment rights have been violated by the  
9 prison's policy of refusing inmates music tapes and CDs bearing an "explicit lyrics" designation.  
10 (*Id.* at 46.)

11 In Count XI, Plaintiff alleges that prison officials violated his right to equal protection  
12 by preventing him from being paid for his job in the prison kitchen, in contrast to other  
13 inmates. (*Id.* at 48.)

14 Finally, in Count XII, Plaintiff alleges that parole board members knowingly used  
15 "invalid, ineffective, and illegal" parole standards and guidelines to deny Plaintiff parole. (*Id.*  
16 at 48A.)

17 Plaintiff seeks general, compensatory, and punitive damages in varying amounts ranging  
18 between \$50,000 and \$250,000 against each of the various defendants, as well as attorney fees  
19 and other legal costs. He also seeks *inter alia* injunctive relief to cease being considered for  
20 parole based on his sex offender, racial, and geographic statuses, as well as a new parole  
21 hearing.

22 Defendants move for judgment based on various defenses, including the statute of  
23 limitations, res judicata, preclusion through a prior settlement agreement, and absolute  
24 immunity. Defendants further argue that even assuming the truth of Plaintiff's factual  
25 allegations, his remaining claims based on the Eighth Amendment and the Due Process, Equal  
26 Protection, Ex Post Facto, and Double Jeopardy Clauses of the U.S. Constitution fail to state  
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1 cognizable claims for relief.<sup>2</sup>

## 2 II. LEGAL STANDARD

3 A motion brought under Federal Rule of Civil Procedure 12(c) tests the legal sufficiency  
4 of the opposing party's pleadings after the pleadings are closed. The Rule provides a means for  
5 disposing cases when the material facts are not in dispute between the parties and a judgment  
6 on the merits can be achieved by focusing on the content of the competing pleadings, exhibits,  
7 matters incorporated by reference in the pleading, whatever is central or integral to the claim  
8 for relief or defense, and any facts taken upon judicial notice. 5C Charles Alan Wright, Arthur  
9 R. Miller, & Mary Kay Kane, *Federal Practice & Procedure Civil* 3d § 1367 (2008).

10 A motion for judgment on the pleadings bears close resemblance to a Rule 12(b)(6)  
11 motion to dismiss. *Qwest Comms. Corp. v. City of Berkeley*, 208 F.R.D. 288, 291 (N.D. Cal.  
12 2002). The Rule 12(c) motion is appropriate when assuming the truth of all material facts  
13 alleged by the responding party, the moving party is entitled to judgment as a matter of law.  
14 *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). All  
15 allegations of fact by the party opposing the motion are taken as true, and all inferences that  
16 may be reasonably drawn from the facts should be construed in favor of the plaintiff. *General*  
17 *Conference Corp. of Seventh-Day Adventists v. Seventh Day Adventist Congregation Church*,  
18 887 F.2d 228, 230 (9th Cir. 1989). Uncontested allegations to which the other party had an  
19 opportunity to respond are taken as true. *Flora v. Home Fed'l Sav. & Loan Ass'n*, 685 F.2d  
20 209, 211 (7th Cir.1982).

21 Generally, a court may only consider allegations made in the complaint and answer;  
22 extrinsic factual material may not be taken into account. *Powe v. Chicago*, 664 F.2d 639, 642  
23 (7th Cir.1981). There is a narrow exception to this rule for materials properly attached to a  
24 complaint as exhibits. *Amfac Mortg. Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429

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26 <sup>2</sup>With respect to the failure to state cognizable claims, Defendants Vieth and Goodson have moved to join  
27 the instant motion. (Doc. #76 and 83.) Plaintiff has filed a notice of non-opposition. (Doc. #92.) The court  
28 recommends that these motions to join should be granted.

1 & n.2 (9th Cir.1978). If matters outside the pleadings are presented to and not excluded by the  
2 court, the motion for judgment on the pleadings is converted into a Rule 56 summary judgment  
3 motion. *Hal Roach Studios, Inc.*, 896 F.2d at 1550.

4 *Apro se* complaint, however inartfully pleaded, must be held to less stringent standards  
5 than formal pleadings drafted by lawyers. *Erickson*, 127 S.Ct. at 2200 (quoting *Estelle v.*  
6 *Gamble*, 429 U.S. 97, 106 (1976)). The court must construe the pleadings liberally and afford  
7 the plaintiff any benefit of the doubt. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).  
8 However, sweeping conclusory allegations will not suffice. *Leer v. Murphy*, 844 F.2d 628, 634  
9 (9th Cir. 1988). In giving liberal construction to a pro se civil rights complaint, the court is not  
10 to supply essential elements of the claim that were not initially pled. *Ivey v. Bd. of Regents of*  
11 *the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

### 12 III. DISCUSSION

#### 13 **A. STATUTE OF LIMITATIONS**

14 Defendants Bayer and Angelone, both former directors of the Department of  
15 Corrections, move for dismissal of the claims pled against in Count I of the complaint.<sup>3</sup>  
16 Section 1983 actions are treated as state law personal injury actions for purposes of applying  
17 the statute of limitations. *Harding v. Balceran*, 889 F.2d 906, 907 (9th Cir. 1989). The  
18 Nevada statute of limitations for personal injury actions is two years. Nev. Rev. St. §  
19 11.190(4)(e). Therefore, the statutory period for bringing a § 1983 action is two years as well.  
20 *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985).

21 Defendants Angelone and Bayer argue that because they retired six years since Plaintiff  
22 learned of his sex offender classification (the predicate for Counts 1), they should be dismissed  
23 from the complaint. However, the statute of limitations is tolled until the plaintiff knows or  
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25 <sup>3</sup> Defendant Bayer has moved to join Defendant Angelone's motion for judgment on the pleadings on these  
26 grounds. (Doc. #43.) The complaint asserts one claim against Defendant Bayer in Count I. Plaintiff has opposed,  
27 challenging the merits of Defendant Bayer's claims against him but not the actual joinder. (Doc. #48.) The court  
28 recommends that the motion to join should be granted.

1 has reason to know of the injury that is the basis of the action. *Miller v. Davis*, 420 F.Supp.2d  
2 1108, 1110 (9th Cir. 2006). Defendants do not challenge the assertion that Plaintiff did not  
3 learn of his sex offender classification until September 25, 2006. Neither do they provide any  
4 reasoning why Plaintiff should have been aware of the classification before this date.  
5 Therefore, the original complaint, filed April 21, 2008, was timely. Accordingly, the claims  
6 against these defendants in Count I is not barred by the statute of limitations.

7 Defendant Angelone also denies his personal participation with respect to Count II. This  
8 claim relates to Plaintiff's transfer to LCC in 1998. Defendant argues that this claim should be  
9 dismissed because he retired from NDOC in 1994. In response, Plaintiff argues that his  
10 classification as a sex offender could have occurred when he was first incarcerated in 1991.  
11 (Doc. #35 at 3.) While Plaintiff admits he is unsure exactly when he received the alleged  
12 classification, the procedural posture of this motion requires the court to assume that the  
13 relevant conduct occurred sometime after 1991 while Defendant Angelone was still an NDOC  
14 employee. Accordingly, the motion to dismiss Count II should be denied.

15 **B. RES JUDICATA**

16 Defendants move for judgment on Count VIII of the amended complaint, arguing that  
17 it is barred by res judicata. Res judicata, or claim preclusion, provides that a final judgment  
18 on the merits of an action precludes the parties from relitigating all issues that were or could  
19 have been raised in that action. *Rein v. Providian Financial Corp.*, 270 F.3d 895, 898-99 (9th  
20 Cir. 2001). Claim preclusion is appropriate where: (1) the parties are identical or in privity, (2)  
21 the judgment in the prior action was rendered by a court of competent jurisdiction, (3) there  
22 was a final judgment on the merits, and (4) the same claim or cause of action was involved in  
23 both suits. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.2001).

24 The first three factors in the *Owens* analysis are not at issue here. Instead, applying res  
25 judicata to this case turns on whether the cause of action is different from the prior suit.  
26 *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982). To determine  
27 whether successive lawsuits involve a single cause of action, this court analyzes the claims  
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1 according to the following set of factors, with an emphasis on the last:

2 (1) whether rights or interests established in the prior judgment would be  
3 destroyed or impaired by prosecution of the second action; (2) whether  
4 substantially the same evidence is presented in the two actions; (3) whether the  
two suits involve infringement of the same right; and (4) whether the two suits  
arise out of the same transactional nucleus of facts.

5 *Id.* at 1201-02.

6 The current claim alleges that after Plaintiff was successful in a lawsuit<sup>4</sup> against Warden  
7 Schomig for retaliation in 2006, he was subsequently retaliated against by Defendant Whorton  
8 and other prison officials. Plaintiff argues that his situation within the prison remained  
9 unchanged because Defendants maintained the original retaliatory measures imposed by  
10 Warden Schomig. (Doc. #21 at 42-43.) Defendants contend that the lawsuits are the same  
11 because the current defendants are in privity with Schomig and because the same set of facts  
12 is implicated by both actions. (Doc. #30 at 7.)

13 The claims in the two lawsuits are distinguishable. While both allege retaliatory conduct  
14 by NDOC officials, they do not “arise out of the same transactional nucleus of facts” or rely on  
15 the same evidence. *See Constantini*, 681 F.2d at 1202. The previous complaint is based on the  
16 events occurring in May 2003, when Warden Schomig allegedly placed Plaintiff in  
17 administrative segregation at High Desert State Prison, seized his papers, changed his level  
18 status, and transferred him to another institution after discovering that Plaintiff had written  
19 a letter to the NDOC director. *See Case #3:03-CV-577*, Doc. #11 (amended complaint). The  
20 current complaint alleges that since the prior case was closed in September 2006, prison  
21 officials have *maintained* the effects of Warden Schomig’s retaliatory conduct. Plaintiff  
22 specifically alleges that Defendants have denied Plaintiff’s grievances related to a transfer out  
23 of LCC and have refused to have his administrative record expunged, which allegedly contains  
24 false accusations against him. (Doc. #21 at 18.)

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27 <sup>4</sup> *Lyons v. Schomig*, 3:03-CV-577-RAM (D. Nev.)



1 The distinction between prior and subsequent claims for a continuing course of conduct  
2 is well-recognized for res judicata. According to the Supreme Court,

3 That both suits involved ‘essentially the same course of wrongful conduct’ is not  
4 decisive. Such a course of conduct ... may frequently give rise to more than a  
5 single cause of action.... While the [prior] judgment precludes recovery on claims  
6 arising prior to its entry, it cannot be given the effect of extinguishing claims  
7 which did not even then exist and which could not possibly have been sued upon  
8 in the previous case.

9 *Lawlor v. Nat’l Screen Serv. Corp.*, 349 U.S. 322, 327-28 (1955). See also *Storey v. Cello*  
10 *Holdings, LLC*, 347 F.3d 370, 383 (2d Cir. 2003) (res judicata does not bar claim in subsequent  
11 action that is premised on a continuance of the same course of conduct). Plaintiff is not  
12 attempting to relitigate the prior claims in his present lawsuit, which involve a different party,  
13 a different period of time, and at least somewhat different retaliatory conduct. Rather, he  
14 argues that prison officials are *continuing* to retaliate against him. It would not have been  
15 possible for Plaintiff to allege this claim in his previous lawsuit because he did not know  
16 whether the alleged retaliatory policies would continue. Cf. *Providian Fin. Corp.*, 252 F.3d at  
17 1098 (res judicata bars relitigating issues that could have been raised in the previous action).

18 The remaining *Constantini* factors also suggest that the two lawsuits are distinct.  
19 Applying the first factor, a judgment in one action would not impair the rights established in  
20 the other. For example, even though Plaintiff argued that he was unlawfully transferred to LCC  
21 in the previous action, Defendants could still prevail by showing that he remains there for  
22 legitimate penological reasons. Additionally, under the third *Constantini* factor, the rights  
23 implicated by the two lawsuits are different. In *Schomig*, Plaintiff alleged that he was retaliated  
24 against for writing a letter to the NDOC director. (Doc. #30 at 7.) In this case, the protected  
25 activity allegedly being infringed upon is access to the courts. Therefore, the balance of factors  
26 in the res judicata analysis suggest that the preclusive effect of the *Schomig* judgment is not  
27 available in this case.

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Though it is not one of the *Constantini* factors, Defendants emphasize that Plaintiff attempted to obtain much of the same injunctive relief he now requests at the conclusion of the prior lawsuit. (Doc. #30 at 6.) At the end of the *Schomig* litigation, Plaintiff made a motion for injunctive relief, seeking transfer out of LCC and the expungement of his records. (*Id.*, Ex. B, at 9 [Plaintiff's motion for injunctive relief].) However, the fact that Plaintiff now seeks similar injunctive relief should not change the conclusion of the res judicata analysis, as Plaintiff alleges a unique set of facts to support his claim. Accordingly, the court should find that Count VIII is not barred by res judicata.

### C. PRIOR SETTLEMENT AGREEMENT

Defendants also contend that Count VII is barred by the res judicata effect of a settlement agreement and release executed by Plaintiff at the end of the *Schomig* litigation. A release of a civil rights claim under 42 U.S.C. § 1983 is controlled by federal common law. *Hisel v. Upchurch*, 797 F.Supp. 1509, 1518 (D.Ariz. 1992). Settlement agreements have the attributes of contracts, and they should be construed as such. *Miller v. Fair Child Indus., Inc.*, 797 F.2d 727, 733 (9th Cir. 1986). The language of the contract should be construed to carry out the intention of the parties in light of all the facts and surrounding circumstances. *U.S. v. Irvine*, 756 F.2d 708, 711 (9th Cir. 1985).

The release language relied upon by Defendants includes all claims arising from Plaintiff's prior lawsuit:

Plaintiff agrees to release ... [Defendants] from any claims for relief, causes of action, claims or demands of whatsoever kind and character, whether or not asserted in any of the pleadings described in the Action **which have arisen, directly or indirectly, or may in the future arise, directly or indirectly from the fact situation described in the Action, regardless of whether such claims and demands are known or unknown at the present time.** It is the understanding of the Parties hereto that this release is to end forever the disputes which have arisen or might arise directly or indirectly as a result of the fact situation described in the Action, and to terminate forever any claims known or unknown which the Parties might have or contend to have arising in any manner out of said fact situation.

(Doc. #30, Ex. C, at 24, ¶ 11.) The release applies to any claims arising "directly or indirectly" from the "fact situation described in the Action." "Action" is a term defined as "*Philip J. Lyons*

1 *v. James Schomig, Sgt. D. Weolowski*, Case No. CV-N-03-577-HDM-(RAM).” (*Id.* at 23, ¶ 1.)

2 According to its plain meaning, the settlement consists of all claims arising from the factual  
3 matters described in the pleadings. Therefore, the release is inapplicable for the same reason  
4 that the res judicata bar should fail. The claims in Count VII arise from conduct occurring *after*  
5 the prior lawsuit, not the retaliatory acts underlying that action. Admittedly, Plaintiff’s claims  
6 indirectly involve the facts of the prior lawsuit, as Plaintiff alleges that the retaliatory conduct  
7 at issue here is a continuation of the policies adopted by Warden Schomig. However, the  
8 allegations in this case “arise” from different alleged actors, events, and motives that were not  
9 a necessary consequence of the conduct involved in the first lawsuit. A literal interpretation  
10 of the release language quoted above leads to an absurd result, as it encompasses all claims that  
11 “may in the future arise... indirectly from the fact situation” regardless of whether they are  
12 “known or unknown at the present time.” Practically any claim against LCC “indirectly” arises  
13 from the *Schomig* facts since the case involved Plaintiff’s transfer to the institution in the first  
14 instance. Accordingly, the court should find that the release language quoted above does not  
15 contemplate Count VII. *See Irvine*, 756 F.2d at 710 (contract should be interpreted to avoid  
16 absurd result). Defendants’ motion for judgment on the pleadings based on the settlement  
17 agreement should be denied.

18 **D. ABSOLUTE IMMUNITY (Counts IV, V, VI, and XII)**

19 Defendants argue that they are absolutely immune from claims arising from the denial  
20 of Plaintiff’s parole.<sup>5</sup> Parole board officials are absolutely immune from civil rights suits when  
21 they grant, deny, or revoke parole. *Swift v. California*, 384 F.3d 1184, 1189 (9th Cir. 2004);  
22 *Sellars v. Procnier*, 641 F.2d 1295, 1303 (9th Cir. 1981), *cert. denied*, 454 U.S. 1102 (1981).  
23 The Ninth Circuit based this principle on the “functional similarity” between the tasks  
24 performed by judges, who already enjoy absolute immunity, and parole board officials. *Id.* at  
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26 <sup>5</sup> Defendants Vieth and Goodson have moved to join the instant motion based on this defense. (Doc. #76  
27 and 83.) Plaintiff has filed a notice of non-opposition. (Doc. #92.) The court recommends that these motions to  
28 join should be granted.

1 1303.

2 Plaintiff attempts to evade this holding by distinguishing the Nevada Parole Board from  
3 its California counterpart in *Sellers*, contending that his hearing lacked adequate procedural  
4 safeguards. This argument is unavailing for three reasons. First, while the court observed in  
5 dicta that the California Adult Authority provided some procedural protections to inmates  
6 applying for parole, this was not essential to the holding. The decision instead turned on  
7 application of the “functional similarity” test to determine whether parole boards operated in  
8 a quasi-judicial capacity, and hence required the immunity enjoyed by judicial officers. *Id.* at  
9 1303. The presence of safeguards to prisoners’ liberty interests was not a feature of this  
10 analysis. Second, the Ninth Circuit fully acknowledged that a prisoner would be without  
11 redress, even when officials acted maliciously in denying a prisoner parole. *Id.* at 1303. It held  
12 that this liberty interest must give way to the broader public interest in a well-functioning  
13 parole board. *Id.* Finally, like *Sellers*, Plaintiff has various procedural protections against  
14 arbitrary or capricious decisions by the Parole Board. For example, an inmate can file a writ  
15 of habeas corpus to challenge this type of hearing. *See, e.g., Wilkinson v. Dotson*, 544 U.S. 74,  
16 81 (2005) (inmates may use habeas corpus remedies to seek injunction compelling speedier  
17 release). Additionally, after parole is denied, an inmate is guaranteed the right to routine  
18 rehearings so the Board can reconsider its decision. Nev. Rev. St. § 213.142. The Board cannot  
19 deny parole unless the prisoner has been given notice and an opportunity to attend the hearing.  
20 *Id.* at § 213.130 ¶ 9. Finally, if parole is denied, a prisoner is entitled to specific  
21 recommendations from the Board to improve the possibility of a future release decision. *Id.*  
22 at ¶ 11. These provisions protect an inmate from an undue deprivation of his liberty.  
23 Therefore, Nevada Parole Board members should receive absolute immunity from the claims  
24 pled against them in this action.

25 Plaintiff also argues that he is not challenging the Board officials’ decision to grant, deny,  
26 or revoke parole per se, but rather the policies, practices, and customs used at his hearing.  
27 (Doc. #35 at 13.) He further argues that the conduct alleged in the complaint was not quasi-

1 judicial so that absolute immunity may apply. *Id.* It would be impossible, however, to avoid  
2 the chilling effect of legal liability if officials were immune from the outcomes of their decisions,  
3 but not from the procedures they utilized. While the Ninth Circuit has recognized limits to the  
4 scope of immunity for parole officials, the conduct at issue in this case is not sufficiently  
5 removed from the quasi-judicial process that requires absolute immunity. *See Swift*, 384 F.3d  
6 at 1189 (recognizing qualified rather than absolute immunity for parole officials with  
7 supervisory but not adjudicatory responsibilities). Plaintiff's argument that the officials were  
8 not functioning as the Board but rather as an advisory panel should fail for the same reason.  
9 The panel has direct input into whether parole is granted, and there is no other hearing during  
10 which the Board considers the inmate's arguments. Even though the Parole Board delegated  
11 its responsibilities to a three-person panel of its members, that does not lead to the conclusion  
12 that the officials in this case were acting in anything but a quasi-judicial manner.

13 Plaintiff also contends that the Board officials are not entitled to immunity because they  
14 were acting in a policymaking rather than judicial capacity. Plaintiff does not allege any facts  
15 showing that the defendants actually adopted a policy, custom, or practice rather than a routine  
16 decision to deny parole. Characterizing the functions exercised by the defendants as  
17 "policymaking" does not change the need for the decisionmaking process to remain  
18 unencumbered by legal liability.

19 Finally, Plaintiff argues that as of the date of his hearing, there was no state law that  
20 gave the Board quasi-judicial status or that exempt it from the requirements of Nevada's Open  
21 Meeting Law. Even though the Nevada legislature and Supreme Court had not yet recognized  
22 parole board hearings as quasi-judicial, that does not change the conclusion of *Sellars*, which  
23 was decided as a matter of federal law. Moreover, in *Witherow v. State Board of Parole*  
24 *Commissioners*, the Nevada Supreme Court subsequently held that hearings conducted by the  
25 Board were exempt from Open Meeting Law because they were quasi-judicial proceedings. 167  
26 P.3d 408, 411 (2007). Though the parole hearing in this case occurred before passage of the  
27 amendment, the same was the true for the hearing at issue in *Witherow*. The court held that  
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1 prior parole board hearings were exempt from the Open Meeting Law as well.<sup>6</sup> Therefore,  
2 there is no basis for arguing that Plaintiff's parole board hearing lacked a quasi-judicial  
3 character or that absolute immunity should not apply.

4 Judgment should be entered dismissing the claims against the Parole Board members  
5 for money damages as alleged in Counts IV, V, VI, and XII. Absolute immunity extends to  
6 Plaintiff's claim for injunctive relief as well. Section 1983 provides that "in any action brought  
7 against a judicial officer for an act or omission taken in such officer's judicial capacity,  
8 injunctive relief shall not be granted unless a declaratory decree was violated or declaratory  
9 relief was unavailable." Federal Courts Improvement Act of 1996, § 309(c), Pub. L. No.  
10 104-317, 110 Stat. 3847, 3853 (1996) (amending 42 U.S.C. § 1983). No such declaratory relief  
11 is alleged. In light of their functional similarities to judicial officers, the Parole Board members  
12 should receive this immunity as well. *See Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999).  
13 Therefore, the claims for injunctive relief against the Board members should also be dismissed.  
14 Plaintiff is still entitled to pursue his claims for declaratory relief. *See Corliss v. O'Brien*, 2006  
15 WL 2686644, \*3 (3rd Cir. Sep. 20, 2006) (the 1996 amendment does not alter case law  
16 regarding the availability of declaratory relief against judicial officers) (citing *Brandon E. ex*  
17 *rel. Listenbee v. Reynolds*, 201 F.3d 194, 197-98 (3d Cir.2000)); *Haas v. Wisconsin*, 109  
18 Fed.Appx. 107, 114, n. 8, 2004 WL 1799360, \*6 (7th Cir.2004) (§ 1983 allows claims for  
19 declaratory relief); *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) (the 1996 amendment  
20 limits the relief available to declaratory relief).

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25 <sup>6</sup>The Legislature amended Nevada Revised Statutes § 213.130 to provide that parole release hearings were  
26 "quasi-judicial" and that "[n]o rights other than those conferred pursuant to this section or pursuant to specific  
27 statute concerning meetings to consider prisoners for parole are available to any person with respect to such  
28 meetings." The Nevada Supreme Court considered this provision as evidence that the state legislature intended  
to treat all parole hearings as quasi-judicial proceedings that are exempt from the Open Meeting Law, even those  
hearings that occurred before passage of the amendment. *Witherow v. Bd. of Parole Commrs.*, 167 P.3d 408, 410-  
11 (2007).

**E. GEOGRAPHIC DISCRIMINATION (Count VI)**

Count VI of the complaint alleges that Plaintiff was denied his Fourteenth Amendment right to equal protection because he received a more stringent parole hearing as a result of his imprisonment in a northern region of the state. (Doc. #21 at 37.) Defendants argue that this count should be dismissed because “there is no recognized claim for relief for geographical discrimination between two panels of the same interstate agency regarding a parole application.” (Doc. #30 at 10.) The *sui generis* nature of Plaintiff’s claim does not prove that he has failed to state a cognizable claim or that Defendants are entitled to judgment as a matter of law. Moreover, inmates have successfully challenged the imposition of a stricter set of parole guidelines based on their geographic location within the prison system. *See Walker v. Luther*, 644 F.Supp. 76 (D.Conn. 1986). Defendants fail to allege anything specific that would preclude Plaintiff from bringing his claim. Defendants’ motion for judgment should be denied.

**F. DUE PROCESS (Counts IV, V, VII, and XII)**

Plaintiff alleges due process deprivations arising from the procedures used at his parole hearing. In certain cases, a parole statute can give rise to a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *See Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). To confer such an interest, the statute should contain a mandatory predicate such as “shall” or “must” that indicates an entitlement to parole. Lacking this language, the statute does not create a constitutionally protected liberty interest. *Greenholtz*, 442 U.S. at 7; *Baumann v. Arizona Dep’t of Corr.*, 754 F.2d 841, 844 (9th Cir. 1985).

Nevada’s parole statute does not contain mandatory language. According to Nevada Revised Statutes § 213.1099, the Board “may” release a prisoner parole after considering various enumerated factors. *See also Cooper v. Sumner*, 672 F.Supp. 1361, 1367 (D. Nev. 1987). Therefore, no protectable liberty interest arises for a Nevada inmate to be granted parole. *Cooper*, 672 F.Supp. at 1367; *Butler v. Wolff*, 28 F.3d 105 (9th Cir. 1994), at \*1 (unpublished disposition). As a result, Plaintiff cannot state a claim based on the fairness of



1 the procedures used at his parole proceeding. *Cooper*, 672 F.Supp. at 1367. The motion for  
2 judgment dismissing the due process claims in Counts IV, V, VI, and XII should be granted.

3 **G. EX POST FACTO CLAUSE (COUNTS V AND VII)**

4 Counts V and VII of the complaint allege that the application of stricter parole guidelines  
5 adopted after Plaintiff's sentencing violated the Ex Post Facto Clause of the Constitution.  
6 (Doc. #21 at 36, 40). An ex post facto law "changes the punishment, and inflicts a greater  
7 punishment, than the law annexed to the crime, when committed." *Wallace v. Christensen*,  
8 802 F.2d 1539, 1553 (9th Cir. 1986) (quoting *Calder v. Bull*, 3 U.S. 386, 390 (3 Dall. 1798)).  
9 It is a well-settled proposition in this circuit, however, that the federal parole guidelines are not  
10 laws for purposes of the Ex Post Facto Clause. *Wallace*, 802 F.2d at 1553; *Smith v. United*  
11 *States Parole Comm'n*, 875 F.2d 1361, 1367-68 (1989) (application of revised federal parole  
12 guideline did not violate ex post facto because it was not a law). Not all parole guidelines are  
13 exempt from the Ex Post Facto Clause. Where *state* parole regulations have the force and effect  
14 of law, set forth specific requirements before discretion may be exercised by the parole  
15 authority, and directly affect the sentence served by the inmate, the Ex Post Facto Clause  
16 applies. *Flemming v. Oregon Bd. of Parole*, 998 F.2d 721, 727 (9th Cir. 1993).

17 The guidelines in this case do not fall within the *Flemming* category of parole  
18 regulations subject to ex post facto scrutiny. First, Nevada's parole guidelines do not have the  
19 force and effect of law. According to the Nevada Administrative Code § 213.560(1), "the  
20 standards ... may be considered by the Board in determining whether to grant, deny, continue  
21 or revoke parole, but nothing contained in those sections shall be construed to restrict the  
22 authority of the Board", even where application of the standards would lead to a different  
23 result. Nev. Admin. Code § 213.560(1) (2008). Additionally, the Board may deviate from the  
24 standards based upon any circumstances it deems appropriate. *Id.* at § 213.560(2). Therefore,  
25 the parole guidelines challenged by Plaintiff operate not as law, but rather as a procedural  
26 guidepost. *Smith*, 875 F.2d at 1367 ("the operative factor in assessing whether a directive  
27 constitutes a 'law' for ex post facto purposes is the discretion that the Parole Commission  
28

1 retains to modify that directive or to ignore it altogether”). Second, the guidelines do not  
2 establish any threshold requirements before the Board may grant or deny parole. Third, any  
3 connection between an increase in the recommended sentence and plaintiff’s parole denial is  
4 speculative at best, as Plaintiff offers no evidence of the Board’s reliance on these guidelines  
5 in making its decision.

6 Plaintiff argues that the guidelines are “laws” to the extent that the legislature exerts  
7 significant control over them. However, the statutory requirements for the guidelines are  
8 generalized in nature, specifying certain characteristics but no actual content for the  
9 regulations. See Nev. Rev. St. § 213.10885 (requiring that standards should be based on  
10 objective criteria and reflect the probability of recidivism). This direction does not convert the  
11 parole guidelines into legislative enactments reviewable under the Ex Post Facto Clause.  
12 Judgment should be entered for Defendants on the claims arising from this provision in Counts  
13 V and VII.

#### 14 **H. DOUBLE JEOPARDY CLAUSE (COUNTS V AND VII)**

15 Plaintiff alleges that by considering his dismissed criminal charge, the Parole Board  
16 violated his rights under the Double Jeopardy Clause of the Fifth Amendment. The Double  
17 Jeopardy Clause provides that no person shall “be subject for the same offence to be twice put  
18 in jeopardy of life or limb.” U.S. Const. Amend. V. “This protection applies both to successive  
19 punishments and to successive prosecutions for the same offense.” *United States v.*  
20 *Soto-Olivas*, 44 F.3d 788, 789 (9th Cir.1995) (quoting *United States v. Dixon*, 509 U.S. 688,  
21 694 (1993)).

22 In this case, the parole guidelines allow the Board to consider a wide variety of factors  
23 in determining the probability of recidivism, including a prisoner’s dismissed criminal charges.  
24 See Nev. Admin. Code § 213.520(2). Contrary to Plaintiff’s allegations, a denial of parole is not  
25 punishment for double jeopardy purposes. See *Alessi v. Quinlan*, 711 F.2d 497, 501 (2d  
26 Cir.1983) (denial of parole “is neither the imposition nor the increase of a sentence, and it is  
27 not punishment for purposes of the Double Jeopardy Clause”). Had Plaintiff been charged with  
28

1 and acquitted of the dismissed offense *after* he was granted parole, it could still serve as a basis  
 2 for revocation. *Standlee v. Rhay*, 557 F.2d 1303, 1306 (9th Cir. 1977). Because the Board's  
 3 decision neither subjected Plaintiff to a second criminal prosecution nor to multiple  
 4 punishments for the same offense, his double jeopardy claims should be dismissed. *See*  
 5 *generally United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). Judgment should be entered  
 6 for Defendants on the claims arising from the Double Jeopardy Clause in Counts V and VII.

#### 7 **I. EIGHTH AMENDMENT**

8 Plaintiff argues that the cumulative effect of Defendants' conduct violated his Eighth  
 9 Amendment right to be free from cruel and unusual punishment. (Doc. #35 at 31.) Assuming  
 10 that Plaintiff's allegations could be aggregated in this way, an inmate has no constitutional right  
 11 to be conditionally released before the expiration of a valid sentence. *Greenholtz*, 442 U.S. at  
 12 7. Even the denial of parole on a life sentence is constitutionally valid. *U.S. v. Valenzuela*, 646  
 13 F.2d 352, 354 (9th Cir. 1980). In this case, where the alleged conduct only resulted in a longer  
 14 interval before the inmate could be considered for parole, there can be no finding of cruel and  
 15 unusual punishment. Judgment should be entered for Defendants dismissing the Eighth  
 16 Amendment claims in Counts V, VII, and XII.

#### 17 **IV. RECOMMENDATION**

18 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order  
 19 **GRANTING IN PART** and **DENYING IN PART** Defendants' Motion for Judgment on the  
 20 Pleadings (Doc. #60), as follows:

- 21 • The motions to join by Defendants Bayer, Vieth, and Goodson (Doc. #45, 76 and 83)  
 22 should be **GRANTED**.
- 23 • Judgment on Counts I and II based on the statute of limitations should be **DENIED**.
- 24 • Judgment on Counts IV, V, and VI for Defendants Bisbee, Goodson, Vieth, and Salling  
 25 dismissing the claims for money damages and injunctive relief should be **GRANTED**.
- 26 • Judgment on the claim based on the Fourteenth Amendment Equal Protection Clause  
 27 in Count VI should be **DENIED**.
- 28 • Judgment on Counts IV, V, and VII dismissing the claims based on the Fourteenth  
 Amendment Due Process Clause of the U.S. Constitution should be **GRANTED**.

- Judgment on Counts V and VII dismissing the claims based on the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution should be **GRANTED**.
- Judgment should be entered dismissing the Eighth Amendment claims in Counts V and VII should be **GRANTED**.
- Judgment on Count XII dismissing the claim in its entirety should be **GRANTED**.

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within ten (10) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. Civ. P., should not be filed until entry of the District Court's judgment.

DATED: February 10, 2009.



UNITED STATES MAGISTRATE JUDGE